APPENDIX A
OPINION OF DISTRICT COURT

RONALD M. ANDERSEN

v.

UNITED STATES OF AMERICA, et al.

DC CV-89-00273-RCB

United States Court of Appeals
for the Ninth Circuit

June 9, 1993

MEMORANDUM AND ORDER

Before: FLETCHER, POOLE, and THOMPSON, CIRCUIT JUDGES

Ronald Andersen, former senior trial attorney with the Equal Employment Opportunity Commission ("EEOC"), appeals the district court's dismissal for lack of jurisdiction of his action seeking reinstatement. The district court held that the Civil Service Reform Act ("CSRA" or "Act"), 5 U.S.C. § 2302, precludes judicial review. Andersen contends that the Admin-

istrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., confers jurisdiction on the district court or, alternatively, that it has inherent power to provide him a remedy. He argues that actions involving the protection of professional ethics may not be relegated to a "personnel forum." Appellant's Opening Brief at 36. Such actions, he suggests, fall within a narrow exception to Congress' intent to limit federal employees' remedies to a single comprehensive administrative remedial structure for the resolution of employment grievances.

Andersen sought to invoke jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1361. The district court dismissed his action for lack of subject matter jurisdiction finding none "under either the APA [5 U.S.C. § 702], or the Constitution." Our jurisdiction rests on 28 U.S.C. § 1291.

District court dismissals "based on preclusion by an existing statutory scheme" are reviewed de novo. Berry v. Hollander, 925 F.2d 311, 313 (9th Cir. 1991); see also Rivera v. United States, 924 F.2d 948, 950 (9th Cir. 1991) citing Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990)) (de novo review of the existence of subject matter jurisdiction). Because Congress chose to provide very limited remedies to government employees in Andersen's civil service category, we cannot provide an independent remedy, by implication or otherwise.[1] We affirm the

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[1]On August 17, 1990, Congress amended the CSRA to expand the relief available to excepted service employees with two years continuous service. Pub. L. No. 101-376, § 2(a), 104 Stat. 461; 5 U.S.C. § 7511(a)(1)(C)(ii). The amendments were given prospective effect only. Section 2(c) of Pub. L. 101-376 provides that the amendments "shall apply with respect to any personnel action taking effect on or after

dismissal.

I.

Ronald Andersen was an attorney in the Phoenix District Office of the EEOC for nine years. Hired as a "Schedule A" employee, he is an "excepted service" employee under the terms of the CSRA. From late 1987 until early 1988, Andersen was the senior trial attorney assigned to a sexual harassment case to be tried in federal district court in New Mexico. In January 1988, while preparing for trial, Andersen uncovered a scheme to secure through bribes the false testimony of government witnesses to be presented at trial. He and his supervisors, Trujillo and Green, disagreed on the appropriate response to these revelations. Relying on the advice of the chair of ethics committee of the Arizona

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the effective date of this Act [Aug. 17, 1990]." See 5 U.S.C. §§ 4303, 7511.

State Bar Association whom he retained as an attorney, Andersen believed that he was under professional ethical obligations to take action to prevent misconduct and fraud on the court, specifically withdrawing and advising the court of his reasons. His supervisors expressly forbade him to do so and threatened to treat a failure to follow orders as insubordination. Unable to comply both with the professional ethical advice he had received and his supervisor's orders, Andersen resigned. His attorney explains, "Andersen was placed in the impossible situation of being [professionally] unethical as a lawyer or being insubordinate as an employee. His only alternative was to leave his employment and correct the ethical problem." Aff. of William Bransford, dated Nov. 29, 1990, at ¶ 4. After traveling at his own expense to the court in New Mexico to inform it of the

potential fraud and misconduct,[2] Andersen completed the formal employment termination process characterizing his resignation as a constructive discharge.

Shortly after his separation from employment, Andersen sought reinstatement through a number of procedural avenues. he wrote to the Administrative Officer of the Phoenix District Office of the EEOC seeking information on how to initiate an administrative grievance process. He wrote to the General Counsel and Chairman of the EEOC requesting reinstatement. He contacted his union for its assistance.[3] He complained

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[2]Andersen intended to file a motion to withdraw against the orders of his supervisors. Upon his disclosure to the district court, it vacated the trial date. The case never went to trial. Without discussing what measures it took, the government states that the case was settled.

[3]The collective bargaining agreement ("CBA") between the EEOC and the National Council of EEOC Locals No. 216, American Federation of Government Employees, AFL-CIO

to the Office of Special Counsel ("OSC") alleging reprisals for whistleblowing under 5 U.S.C. §§ 2301(b)(9), 2302(b).

On all fronts Andersen was rebuffed. The OSC "found insufficient evidence of any prohibited personnel practice." Letter from Leonard H. Dribinsky, Asst. Special Counsel for Prosecution, to William Bransford, dated November 20, 1988. The General Counsel indicated that an administrative grievance procedure was barred by Andersen's membership in a collective bargaining unit and that a negotiated grievance procedure was not available because, by his letter to the Administrative Officer, he had specifically

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requires that employees choose between administrative and union-sponsored grievance procedures. CBA § 47.05(a), (b). Union-sponsored grievances may be initiated by the union or the employee. CBA § 47.02(a)(1)-(2). Andersen notes that the union declined to initiate a grievance on his behalf.

elected not to pursue this avenue.[4]

In February 1989, Andersen filed a complaint in district court claiming: (1) a constitutionally-protected property interest in his job; (2) wrongful termination (a pendent state claim); (3) a denial of due process under the APA; (4) a denial of his First Amendment rights. Ruling on a motion to dismiss for lack of jurisdiction, Judge Hardy dismissed Andersen's Bivens claims for damages against all parties and later dismissed the pendent state claim. He allowed the action, to the extent Andersen sought equitable relief, to proceed against the United States, the EEOC, and Thomas. However, upon a renewed motion to dismiss, Judge Broomfield, to whom the

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[4]The Office of the General Counsel concluded that Andersen's letter to the Phoenix District Office initiating an "other than...Union Grievance" could not be considered notice of an intention to proceed with a negotiated or union grievance.

case had been transferred, held that the district court lacked jurisdiction because the CSRA precluded judicial review.

II.

The CSRA, enacted in 1978, provides federal employees with statutory remedies for "prohibited personnel practices" and "adverse actions." Until that time, aggrieved employees asserted a "hodgepodge" of claims founded on a variety of jurisdictional grounds. McAuliffe v. Rice, 966 F.2d 979, 980 (5th Cir. 1992). Congress substituted a unified system for the "patchwork" one that had developed. United States v. Fausto, 484 U.S. 439, 444-45 (1988); Saul v. United States, 928 F.2d 829, 833 (9th Cir. 1991); Rivera, 924 F.2d at 951. Nevertheless, the scheme was not all encompassing. The Supreme Court early recognized that the "comprehensive' scheme had lacunae. Bush v. Lucas, 462 U.S. 367,

385 & n.28 (1983) ("[n]ot all personnel actions are covered by this system"). The CSRA accords varying levels of relief and review for different kinds of injuries suffered by distinct categories of employees. The Act in effect at the time Andersen resigned did not provide significant measures of administrative and judicial relief to "excepted service" employees, relief that was afforded to "competitive service" employees.

The CSRA recognizes at least two kinds of injuries. Chapter 23 sets forth "prohibited personnel practices," the administrative remedies for which are to be obtained through the Office of Special Counsel (OSC). 5 U.S.C. §§ 2301, 2303, 1206, 1208 (1988). The Special Counsel has been

compared to a prosecutor.[5] The OSC, in its discretion, brings charges to the Merit Systems Protection Board ("MSPB" or "Board") based on an employee's complaints and no appeal may be taken by the employee, § 1206. See also Saul, 928 F.2d at 833-34 (describing Chapter 23 actions); Rivera, 924 F.2d at 950 (describing OSC relief). Chapter 75 governs "adverse actions." 5 U.S.C. §§ 7501-7504, §§ 7511-7514.[6] Chap-

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[5]See Peter B. Broida, A Guide to Merit Systems Protection Board Law & Practice 29 (8th ed. 1991); Ellen Bussey, ed. Federal Civil Service Law & Procedures 53 (2d ed. 1990).

[6] Section 7511 sets out which categories of employees may bring charges on account of major adverse action taken against them including removal, suspension for more than 14 days or furlough for more than 30 days, and reductions in grade or pay. Section 7513 details the procedural protections to be accorded by the agency involved. Appeal is provided to the Merit Systems Protection Board, § 7701, and judicial review, by the Federal Circuit, § 7703. Prior to the 1990 amendments, only "preference eligibles" of the "excepted service" (those who had served in the armed

ter 75 remedies that include access to the Board and ultimately a federal court[7] are not available to a "Schedule A" "excepted service" appointee,[8] such as, Andersen. Despite his nine years of service to the EEOC, the CSRA then in effect afforded him only Chapter 23 protection.[9]

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forces) were covered, § 7511(a)(1)(B). See 5 U.S.C. §2108(3); Broida, supra note 5 at 39. Other "excepted service" employees had no recourse to Chapter 75 protections even if they suffered major adverse actions. See Fausto, 484 U.S. at 446-47.

[7]See Broida, supra note 5 at 34-34, 39-41; see also supra note 6.

[8]The civil service is composed of a competitive and excepted service. 5 U.S.C. §§ 2201(1), 2102, 2108; 5 C.F.R. §§ 1.2-4, 6.1-2, 212.101, 212,301, 213.101-03, 213.3101-02, 213.3201, 213.3301. See Broida, supra note 5 at 37-38. Under the regulations attorneys have been designated as "Schedule A" employees. 5 C.F.R. § 213.3102(d).

[9]Were Andersen an employee within the terms of then Section 7511 his alleged constructive discharge would be treated as a major adverse action warranting a hearing before the MSPB. See Bussey, supra note 5 at 97-98 (coerced resignation or retirement

Andersen sought relief in district court when the OSC elected not to bring a charge to the MSPB on Andersen's behalf. Andersen argued to the district court that since his claims are not cognizable under the CSRA, its provisions precluding judicial review are equally inapplicable. The district court's dismissal was grounded in the preemptive nature of the comprehensive personnel statute that by its own terms provides limited remedies to excepted service employees. On appeal, Andersen takes two tacks. First he argues that the CSRA is inapplicable to his particular circumstances. Second he attacks the

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viewed as adverse action and subject to a hearing); Broida, id. at 666-70 (discussing jurisdiction under Chapter 75 for constructive adverse actions); Dumas v. Merit Sys. Protection Bd., 789 F.2d 892, 893, 895 (Fed. Cir. 1986) (affording right to an evidentiary hearing on the existence of jurisdiction where voluntary nature of removal in question.

preclusive sweep accorded it by the district court.

A.

If Andersen's "constructive discharge" is a "prohibited personnel practice" within the meaning of the CSRA, 5 U.S.C. § 2302, any relief Andersen may have is limited to CSRA remedies. The language of this provision is broad. It encompasses "whistle blowing," § 2302(b)(8), and a "catchall"[10] section referring to any violations of the "merit system principles," § 2302(b)(11). These principles include the maintenance of "high standards of integrity, conduct, and concern for the public interest," § 2301(b)(4), and protection from reprisals against "whistleblowers," §2301(b)(9), the basis upon which Andersen originally filed a complaint with the OSC. The district

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[10]See Bussey, supra note 5 at 131.

court noted at least two of these provisions as "cognizant of plaintiff''s claims in this case." District court opinion at 22.

Andersen argues that a "narrow exception" for actions based on ethics violations is contemplated by Congress so as not to "allow a federal agency hiding within personnel laws to cover up the unethical acts of its supervisory attorneys." Appellant's Opening Brief at 21, 35. However, congress' recent amendments to open greater administrative and judicial avenues to "whistleblowers" of all kinds, including those bound by professional ethics, belies Andersen's argument. See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989), as codified at 5 U.S.C. §§ 1221 (affording recourse to MSPB and the Federal Circuit for actions alleging "prohibited personnel

practice," § 2302(b)(8)); see also Pub. L. No. 101-376-104 Stat. 46 (1990), adding § 7511(a)(1)(C) (expanding categories of employees covered under Chapter 75). Instead of exempting such employees and such grievances from the CSRA regime, Congress has progressively expanded the remedies available for whistleblowers and those whose jobs are jeopardized by maintaining "high standards of integrity, conduct, and concern for the public interest." 5 U.S.C. § 2301(b)(4). We conclude the CSRA and limited to its remedies.

B.

Andersen's second argument that the CSRA's preclusive sweep is not so broad as to deny jurisdiction in his case is not persuasive. The Supreme Court consistently has held that Bivens actions and actions under the Tucker or Back Pay Act, 28 U.S.C. § 1491, are precluded by the CSRA. Bush,

462 U.S. at 368, 388-90; Fausto, 484 U.S. at 447-55. In Bush, the Supreme Court acknowledged that the remedy available for the violation of a federal employee's First Amendment rights under the CSRA "was not as completely effective as a Bivens-type action based directly on the Constitution," but nonetheless declined to find jurisdiction. Bush, 462 U.S. at 377. It reasoned that Congress was better positioned to determine what level of relief to afford government employees, id. at 390, and that "it would be inappropriate for [the Court] to supplement that regulatory scheme with a new judicial remedy," id. at 368.[11] After

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[11]Although Schweiker v. Chilicky, 487 U.S. 412 (1988) dismissed a Bivens claim in the context of the Social Security Act, its analysis has been widely applied in CSRA cases. The Court vacated and remanded for reconsideration in light of Chilicky pending cases that had allowed Bivens actions. See e.g., Kotarski v. Cooper [hereinafter Kotarski I], 799 F.2d 1342 (9th Cir. 1986), vacated, 487 U.S. 1212 (1988), rev'd on

analyzing the remedies provided by the CSRA, and noting that for some employees these remedies are sharply circumscribed, the Court in Fausto held that federal employees could not seek judicial review under the Tucker Act. In its view:

> the absence of provision for these employees to obtain judi-

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reconsid., Kotarski v. Cooper, [hereinafter Kotarski II], 866 F.2d 311 (9th Cir. 1989); see also McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987), vacated sub nom. Turner v. McIntosh, 487 U.S. 1212 (1988), rev'd on reconsid., McIntosh v. Turner, 861 F.2d 524 (8th Cir. 1988). The Chilicky decision relies on the Court's opinion in Bush and extends its reasoning. Noting that [[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies," the Court emphasized the point that "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program . . . and we see no legal basis that would allow us to revise its decision." Chilicky, 487 U.S. at 423, 429. See Pereira v. United States Postal Serv., 964 F.2d 873, 875 (9th Cir. 1992) (noting extension of reasoning).

> cial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by Chapter 75 [of the CSRA, 5 U.S.C. §§ 7511, 7701, 7703].

Fausto, 484 U.S. at 448-49. The Congressional intent not to allow Tucker Act remedies for certain categories of employees was found in part from the fact that these employees' were deliberately excluded from certain CSRA protections, including judicial review. Id. at 455. Because of "the comprehensive and integrated [nature of the] review scheme of the CSRA," the Court held that no supplementary Tucker Act jurisdiction existed. Id. at 454; see also Broida, supra note 5 at 1993-94 (emphasizing the "significant repercussions" of Fausto for the availability of judicial review outside the CSRA).

Accepting the CSRA as "the bedrock of our analysis," Saul, 928 F.2d 829 at 832, our court has denied judicial review outside the relief provided by the CSRA.[12] See Saul, 928 F.2d at 840; Berry, 925 F.2d at 315-16; Rivera, 924 F.2d at 951; Kotarski v. Cooper [hereinafter Kotarski II], 866 F.2d 311, 312 (9th Cir. 1989); Karamanos v. Egger, 882 F.2d 447, 451-53 (9th Cir. 1989) (precluding Bivens claims); 924 F.2d at 951-52 (precluding Federal Tort Claims Act claims); Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984) (precluding APA claims). The absence of any kind of judicial review or remedy under the CSRA

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[12]But see Broida, Supra note 5 at 1997; Burroughs v. Office of Personnel Management, 764 F.2d 1300 (9th Cir. 1985) (pre-Fausto, APA-based review of classification decisions issued by Office of Personnel Management; see also Karamanos v. Egger, 882 F.2d 447, 451, n.1 (9th Cir. 1989) (questioning validity of Burroughs in light of Fausto).

for certain classes of employees or categories of claims does not alter our jurisdictional analysis. Fausto, 484 U.S. at 448; Saul, 928 F.2d at 840 (CSRA "precludes even those Bivens claims for which the act prescribes no alternative remedy"). In some cases we have relied on this reasoning to preclude all other possible grounds for judicial review where the CSRA applies. Lehman, 779 F.2d at 528 (holding CSRA "provides [employee's] sole recourse"); Veit, 746 F.2d at 511 (declaring trial court "correct in holding that neither the CSRA, the APA nor any other authority gave it the power to review [employee's claim]" and noting "a clear congressional intent to permit federal court review as provided in the CSRA or not at all"); see also Saul, 928 F.2d at 839, 841 (describing Veit court's statement as dictum but citing with approval Lehman holding). As the Rivera

court put it:

> [T]he clear thrust of [this precedent] is that Congress's purpose in enacting the CSRA was to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies, subject to judicial review [as therein provided]. To permit [additional claims] to supplant to CSRA's remedial scheme certainly would defeat that purpose.

Rivera, 924 F.2d at 951.[13] But see Spagnola v. Mathis, 859 F.2d 223, 230 (D.C. Cir. 1988) (en banc) (reserving "the right

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[13]Prior to the Chilicky decision, we relied upon the analysis in Bush suggesting that "meaningful" judicial review must be available for certain claims. See Kotarski I, 799 F. 2d at 1346-50; see also supra note 11. However, in the wake of the Supreme Court's extension of Bush, this is clearly not the appropriate inquire. See Saul, 928 F.2d at 837 ("we shifted our inquiry from evaluating whether the CSRA provided . . . meaningful and adequate remedies to deciding if the CSRA's omission of a . . . remedy . . . was 'inadvertent'"). Cf. Broida, supra note 5 at 30 ("[t]he Board lacks authority to broaden its statutory authority, no matter how compelling the injustice presented by an employee").

of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights").[14]

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[14]Judge Hardy cited Spagnola, but relied solely on Kotarski I to retain jurisdiction. He characterized Kotarski I as viable, for Spagnola-like claims, i.e. constitutional claims for which equitable relief is sought. Andersen presses Spagnola as authority for exercising jurisdiction over his constitutional claims (property interest in civil service employment, and first amendment rights). He seeks equitable injunctive relief (reinstatement). See Gilliam v. Miller, 973 F.2d 760, 761 (9th Cir. 1992) reinstatement considered injunctive relief); Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990), cert. denied, 111 S. Ct. 2825 (1991) (same). We here assume, as the Bush court did, that Andersen's constitutional rights have been violated, 462 U.S. at 372. We nevertheless cannot rely on Spagnola to provide him a remedy. Our court previously has held that "[t]he CSRA precludes [a federal employee] from seeking injunctive relief for his asserted constitutional injury just as it precludes him from bring a Bivens action for damages." Saul, 928 F.2d at 843 & n.7 (noting that under Spagnola the "D.C. Circuit differs from other circuits by permitting federal employees to vindicate their constitutional rights through suits against their supervisors and employing agencies for injunctive

Andersen argues that permitting his APA claim would not supplant the CSRA mechanism because "[b]oth the CSRA and APA have their place in the federal scheme" and the "operative facts" of his case counsel reconciling the competing federal statutes. Appellant's Brief at 35. To the extent that this argument is not a reprise of the earlier contention that the CSRA simply does not apply to employment disputes involving compliance with ethical obligations,[15] it has no support in the caselaw

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relief, but not for damages"). Nor may we rely on Kotarski I, see supra notes 11 & 13.

[15]In his reply brief, Andersen characterizes the APA as "distinct and coexistent with the CSRA." Grey Brief at 4 (emphasis added). At oral argument, Andersen supplied this court with supplemental authority stating that Veterans Administration physicians may obtain judicial review under the APA. Berry v. Hollander, 925 F.2d 1230, 1239-40 (10th Cir. 1986); Heaney v. United States Veterans Admin., 756 F.2d 1215, 1219 (5th Cir. 1985)). However, Veterans Administration physicians are not

identifying the CSRA as the comprehensive, integrated statutory mechanism affording federal employees whatever relief Congress has seen fit to accord. Congress' failure to provide judicial review to some categories of employees simply "reflects a congressional intent that no judicial relief be available," Veit, 746 F.2d at 511 (citing Carducci v. Regan, 714 F.2d 171, 174 (D.C. Cir. 1983) (internal quotations omitted)). That APA actions in particular may be precluded has already been established in this circuit, Veit, 746 F.2d at 511, and others. See e.g., Stephens v. Department of Health & Human Serv., 901 F.2d 1571, 1575-77 (11th Cir.), cert. denied, 498 U.S. 998 (1990); Ryon v.

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covered by the CSRA. Heaney, 756 F.2d at 1218; see also Franks, 796 F.2d at 1239. Because we have determined that the CSRA applies, this line of precedent is irrelevant.

O'Neill, 894 F.2d 199, 201-02 (6th Cir. 1990); Carducci, 714 F.2d at 174-75; Broadway v. Block, 694 F.2d 979, 984 (5th Cir. 1982); see also Broida, supra note 5 at 1996-97.[16]

Andersen attempts to escape the force of this precedent by focussing on the legislative history of the APA indicating

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[16]Before the Supreme Court "emphatically and conclusively established the preemptive nature of the CSRA," Stephens v. Department of Health & Human Serv., 901 F.2d 1571, 1575-76 (11th Cir.), cert. denied, 498 U.S. 998 (1990), a distinction was drawn between constitutional and non-constitutional APA claims. See e.g., Carducci v. Regan, 714 F.2d 171, 173-77 (D.C. Cir. 1983). In asserting APA jurisdiction, Andersen contends that his due process rights have been violated under the APA. That his APA claim is constitutional in nature does not overcome the reasoning of the Supreme Court and circuit precedent which confers no special status on constitutional violations in arriving at jurisdictional determinations. Chilicky, 487 U.S. at 413 ("Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration"); see also Stephens, 901 F.2d at 1575-76 (citing Veit, 746 F.2d at 511).

that this statute may afford equitable relief for actions arising out of "government employment," H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S.C.C.A.N. 6121, 6128-29; Bowen v. Massachusetts, 487 U.S. 879, 899-900 (1988), and on Supreme Court precedent holding that the National Security Act ("NSA"), 50 U.S.C. § 403(c), does not preclude APA-based review of "colorable constitutional claims." Webster v. Doe, 486 U.S. 592, 603 (1988).[17]

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[17]In Webster, the Court concluded that the NSA did not preclude APA review. It described the APA as the "comprehensive" statute. Webster, 486 U.S. at 599. Confronted with an argument similar to the one Andersen advances, the Eleventh Circuit has held Webster irrelevant[]." See Stephens, 901 F.2d at 1577 (plaintiff characterized Webster as representing the "court's reaffirmance of the district court's role in reviewing federal personnel decisions under the APA"). In our view Webster is readily distinguishable. It involved a different statute (the NSA), one not heralded as a comprehensive and integrated remedial system where Congressional intent to exclude additional relief could be discerned. Moreover, the agency involved

The district court points out that while the "APA may apply to 'government employment,'" the APA, itself, provides that it does not apply to the extent other statutes preclude judicial review, 5 U.S.C. 701(A)(1). District court opinion at 19 (internal citations omitted).[18]

III.

The statutory regime that we must apply has been substantially amended since Andersen's grievance arose. if applied retroactively, the amendments would afford

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in that case, the CIA is specifically excluded from the CSRA framework. 5 U.S.C. § 7511(b)(7); see also Broida, supra note 5 at 2004-05; Bussey, id. at 121.

[18]The district court does not discuss the other jurisdictional bases upon which Andersen relies in his complaint. The analysis with respect to Section 1331 and Section 1361 jurisdiction is, in any event, the same as that for APA jurisdiction. See Bush, 462 U.S. at 374, 390 (no jurisdiction under 28 U.S.C. § 1331); McAuliffe, 966 F.2d at 979 (same); Stephens, 901 F.2d at 1576 (no jurisdiction under 28 U.S.C. § 1361); Ryon, 894 F.2d at 205 (same).

him both greater administrative recourse and judicial review. As much as we are struck by the injustice of denying access to redress to a career attorney with nine years of service, we cannot cure the deficits in the statute applicable to Andersen's case. We must affirm.

AFFIRMED.

APPENDIX B
OPINION OF DISTRICT COURT

RONALD M. ANDERSEN

v.

UNITED STATES OF AMERICA, et al.

CIV. No. 89-0273 PHX RCB

United States District Court,
District of Arizona

July 19, 1991.

ORDER

BROOMFIELD, District Judge.

This matter comes before the court on defendants' renewed motion to dismiss and/or cross-motion for summary judgment, and plaintiff's motion for partial summary judgment on count IV of the first amended complaint. Defendants' motion requires the court to consider initially the fundamental issues of subject matter jurisdiction and the effect of another judge's prior order in this case determining that such juris-

diction exists. See Order dated August 17, 1988 (Doc. No. 18).

This action arises from plaintiff's termination on February 9, 1988 from his employment as a senior trial attorney by the Equal Employment Opportunity Commission ("EEOC") at its Phoenix District Office. Plaintiff alleged that he was constructively terminated in violation of several of his constitutional rights. Plaintiff now seeks summary judgment on the basis of his first Amendment claim only, but defendants' renewed motion to dismiss or cross-motion for summary judgment relates to all remaining claims.

I. FACTS

The EEOC assigned plaintiff a sexual harassment case entitled EEOC V. Suite Simpatica, which was set for trial in late February 1988 in the United States District Court for the District of New Mexico. In

January 1988, plaintiff, his co-counsel Niels Loechell, and an EEOC paralegal travelled to New Mexico to interview trial witnesses. During those interviews, plaintiff learned that one of the witnesses, who was also a "charging party" (complainant), had offered another witness money to testify as she directed, and another witness had offered to sell his testimony to all three of the charging parties.

The facts concerning these charges are very involved and are detailed here only in abbreviated form. One of the charging parties, Phyllis Mangum, told plaintiff that a Bob Manley had witnessed one of the complained-of incidents of sexual harassment by her boss. Manly later denied witnessing the event and further claimed that Mangum had offered him $2,000 to testify that he had. When the EEOC lawyers confronted Mangum with Manley's allegation,

Mangum claimed that it was Manley who had demanded the money from her before he would testify.

Plaintiff also discovered a conflict between mangum's testimony and that of another charging party, Darlene Coday, as to how many times Coday had been sexually harassed and whether Mangum had witnessed one of the incidents. In a third incident, Coday and another charging party told plaintiff that Mangum had arranged for Stan Freeman, a relative of Mangum's, to testify to whatever they wanted if they would pay him $10,000 out of their recovery. In one version of the story he demanded $10,000 total, to be paid jointly by the charging parties, and in another version he demanded they each pay him $10,000.

While still in Farmington, plaintiff and Loechell reported these incidents by phone to their supervisor, defendant Rich-

ard Green, supervisory trial attorney for the Phoenix District Office. They discussed whether the EEOC should continue to represent Mangum, and whether to notify the charging parties' individual attorney, Gene Vance of Albuquerque, about these events. Plaintiff claims that Green rejected plaintiff's and Loechell's recommendation that Vance be told about these events. Plaintiff claims that Green rejected plaintiff's and Loechell's recommendation that Vance be told about these events immediately. Green states that he told plaintiff and Loechell to tell Vance about the discrepancies and that the EEOC may refuse to represent Mangum, but that they did not need to decide immediately whether to tell Vance about the possibly criminal acts, advise the U.S. attorney or sever Mangum's case. R. 33, at 2.

After returning to Phoenix, plaintiff memorialized these events in several memoranda to his superiors. He also recommended in a memo to Green dated January 25 that Vance be immediately informed of these events, that the EEOC withdraw from representing Mangum, and that the U.S. Attorney be notified of the bribery charges but requested to refrain from investigating until the civil case was concluded. In addition, plaintiff received advice from attorney Gary Stuart, chairman of the Ethics Committee of the State Bar of Arizona, that it would be unethical to proceed with trial in these circumstances and that he had a duty to notify the court of the possibility that bribery and perjury had been or were about to be committed.

On February 3, on Green's instructions, plaintiff notified Vance of the factual events "without characterization."

Green then attended a settlement conference before the magistrate; he did not tell the magistrate about the problems he had encountered. Plaintiff complains that, other than instructing plaintiff to tell Vance about these events and collecting memos from those involved, plaintiff's supervisors did nothing to resolve the potential ethical problems during the period between the events of January 11-14 and the February 9 meetings described below. Pl.'s Statement of Facts ¶ 5(C)(1). Vance, the charging parties' private counsel, wrote to the EEOC on February 5, expressing his concern that the "gridlock" in the agency's decision-making regarding the ethical problems that had arisen would prejudice his clients.

The conflict between plaintiff and his superior came to a head on Tuesday, February 9, during a series of meetings that

included plaintiff, Loechell, Green and defendant Richard Trujillo, who was regional supervisor of the Phoenix District Office. Green and Trujillo have summarized these discussions in several memoranda. R. 27. The first meeting that day was between plaintiff and Green. Plaintiff related Stuart's ethics opinion and indicated he would need to withdraw from the Suite Simpatica case, and that he thought the whole EEOC office must do so. Green disagreed. Green next met with both plaintiff and Loechell and discussed Stuart's ethics opinion, including whether the problem would be resolved by severing Mangum and not putting her on if convinced she would commit perjury, or going to the magistrate or judge with the problem.

The critical meeting occurred the same afternoon and included Green, Trujillo, plaintiff and Loechell. During this meet-

ing, it was decided that Green and Loechell would go to Albuquerque and possibly Farmington to talk to Vance, the U.S. Attorney and possibly some witnesses. Trujillo said that a decision would be made by Friday as to whether the problem should be taken to the magistrate or judge, and that Green and Loechell may be asked to do so Friday while they were in Albuquerque.

Plaintiff stated that he intended to file a motion to withdraw and that he would do nothing further on the case except prepare to turn it over to another attorney. Trujillo told him that he was to continue preparing the case for trial, and that his failure to do so would be considered insubordination. Plaintiff then brought in John Treadwell, a union steward, and the parties made various representations to him of what had just occurred.

Green and plaintiff met alone after that meeting. Green told plaintiff that a decision would be made by Friday about whether the matter should be taken to the magistrate, and he rejected plaintiff's suggestion that the magistrate by informed immediately. He also told plaintiff that he should continue working on the trial, that he needed to do the same work anyway in order to prepare it for another attorney. Plaintiff state, however, that Stuart had advised him by telephone that if a new lawyer would need time to prepare for the impending trial, plaintiff should withdraw immediately.

At 10:00 p.m. the same day, plaintiff called Green at home and tendered his resignation. The next day plaintiff flew to Albuquerque where he reported the situation to a magistrate. The magistrate concluded that the case was "tainted" and

ordered plaintiff to turn the matter over to the U.S. Attorney, which he did. The U.S. Attorney initiated an investigation of the matter but took no further action. Defendant's Statement of Facts, ¶ 39 n.9. The magistrate also spoke to the trial judge who vacated the trial date.

On February 16, 1991, plaintiff began to seek reinstatement through administrative channels of the EEOC. At that time, he specifically directed the EEOC to consider his application for relief as applying to all potential sources of administrative relief except that provided by union grievance procedures. Eventually that proved to be his undoing because his claim was not presented to the union until after plaintiff failed to obtain relief from other administrative sources, which held that he had voluntarily resigned. By that time, the deadline for filing a union

grievance had passed. Plaintiff appealed the union's decision that his claim was untimely to the Federal Labor Relations Authority, but his appeal was denied. R.65-70.

II. PROCEDURAL HISTORY

Plaintiff initiated this action on February 7, 1989.[1] On June 2, 1989, defendants filed a motion to dismiss on the grounds that; (1) the constitutional tort claims against the government were barred by sovereign immunity: (2) the Bivens claims against the individual defendants were barred by the comprehensive relief scheme of the Civil Service Reform Act of 1978 (CSRA); (3) the court thus had no

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[1]Plaintiff pursued several other avenues of relief prior to bringing this action. The history of his administrative proceedings is recounted below in connection with defendant's claim that plaintiff failed to exhaust his administrative remedies.

jurisdiction over the pendent state claims for wrongful termination; and (4) because the Administrative Procedures Act ("APA") was preempted by CSRA, the court had no jurisdiction to review the federal personnel actions at issue in this case. Defendants conceded in their reply, however, that the APA did provide the court with jurisdiction to review constitutional claims.

On August 17, 1989, Judge Hardy entered an order dismissing the Bivens claims against the individual defendants and all claims against the government for money damages. The order denied the motion as it pertained to claims for equitable relief, however, on the basis that the court had jurisdiction under either the APA or the Constitution to hear such claims. The court allowed plaintiff to proceed with his Fifth Amendment due process and his First

Amendment claims. By order dated February 22, 1990, the court also dismissed the pendant state law claims stated in count II of the complaint.

II. JURISDICTION

A. Effect of prior order

Plaintiff contends that this court is bound by Judge Hardy's order dated August 17, 1989 denying the motion to dismiss as it pertained to equitable claims against the United States, the EEOC and its chairman on the basis that Congress waived sovereign immunity as to claims for equitable relief in the Administrative Procedures Act, 5 U.S.C. § 702. Further, the parties agree that at least part of the basis for that ruling was defendants' concession in their reply in support of the motion to dismiss that the court had jurisdiction under the APA to hear such claims. See Defendants' Reply in Support of Motion to

Dismiss, at 4. Plaintiff argues that defendants now are either judicially estopped from denying a matter conceded in prior pleadings or estopped on the basis of plaintiff's reliance upon the concession and the resulting court order.

Law of the case principles guide the court's discretion but do not limit the court's power to depart from a prior holding in the same case. Arizona v. California, 460 U.S. 605, 618, 103 S. Cit. 1382, 1391, 75 L.Ed.2d 318 (1973). Under guidelines established by the Ninth Circuit, a court may properly decide not to follow a prior decision when:

> there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous and would result in injustice.

Handi Investment Co. v. Mobil Oil Corp., 653 F.2d 391, 892 (9th Cir. 1981). Defen-

dants present no new authority not addressed in their original motion to dismiss. Rather, they seek to revise their interpretation of that authority and contend, based upon their revised interpretation, that the prior ruling was clearly erroneous and would result in injustice.

The court is compelled to revisit Judge Hardy's prior ruling, because the matter at issue concerns the fundamental question of whether this court has subject matter jurisdiction. See United States v. Houser, 804 F.2d 565, 568 (9th Cir. 1986). A court must always satisfy itself that it has subject matter jurisdiction and must dismiss if it finds itself to be without it, regardless of whether a prior order reached a different conclusion and despite any questions of judicial or equitable estoppel. The law governing the issue of the CSRA's preemption of judicial review

under the APA or directly under the Constitution has been substantially clarified by recent decisions of both the Supreme Court and the courts of appeal in other circuits that apparently did not enter into Judge Hardy's analysis.

B. Sovereign immunity

Two sections of the August 17, 1989 order addressed the issue of subject matter jurisdiction. In section I, the court denied defendants' motion to dismiss on the issue of sovereign immunity. The court determined that it had jurisdiction to hear plaintiff's constitutional claims for equitable relief under section 10(a) of the APA, 5 U.S.C. § 702, in which Congress waived sovereign immunity as to injunctive relief for the effects of agency action. Order to August 17, 1989, at 6 (quoting McCartin v. Norton, 674 F.2d 1317, 1321-22 (9th Cir. 1982). (The waiver was held not

to extend to the Bivens claims against the governmental entities, however.)

Defendants apparently now argue that the government's sovereign immunity has not been waived because: (1) the waiver of sovereign immunity embodied in § 702 of the APA does not extend to any action that is not, or cannot be, brought under the APA; and (2) this action cannot be brought under the APA, because that act has been preempted by the CSRA. The court disagrees with defendants' conclusion. The government's waiver of sovereign immunity in § 72 of the APA is not limited to actions "brought under" the APA but extends as well to other suits for non-monetary relief brought under 28 U.S.C. § 1331. Assiniboine and Sioux Tribes v. Board of Oil and Gas, 632 F.2d 788, 797 (9th Cir. 1980). Thus, whether the comprehensive scheme of the CSRA precludes the court from exercising jurisdic-

tion over plaintiff's claims, under either the APA or directly under the Constitution, is a separate question from the issue of sovereign immunity. Section 702 of the APA constitutes a waiver of the government's sovereign immunity as to equitable claims, whether or not this case may be brought under the APA.

C. CSRA preemption of the APA

In section I of the August 19, 1989 order, the court decided that §702 of the APA constituted a waiver of the government's sovereign immunity, but went on to state that "[t]he statute specifically provides...that it does not affect other limitations on judicial review, such as failure to exhaust administrative remedies or exclusive alternative remedies." Order of August 17, 1989, at 7. The court turned in section IV of the order to this second jurisdictional question: whether the court

had the power to hear plaintiff's claims brought under the APA, given the pervasive regulatory scheme of the CSRA. The court ruled that it did have jurisdiction under the APA to hear plaintiff's constitutional claims. The court relied in part upon the Ninth Circuit decision, Kotarski v. Cooper, and defendants' concession in their reply that under Kotarski plaintiff could bring his constitutional claims under the APA. Id. at 12 (citing Kotarski v. Cooper, 799 F.2d 1342, 1350 & N.6 (9th Cir. 1986) ("Kotarski I"), vacated on other grounds, 108 S. Ct. 2861 (1988)).

The court apparently did not find it necessary to address the possibility of jurisdiction directly under the Constitution, because the court found jurisdiction over plaintiff's constitutional claims

under the APA.[2] Order of August 17, 1989, at 12. In ruling that the pervasive scheme of the CSRA deprived the courts of the power to provide a judicial Bivens remedy against the individual defendants, however, the court cited the Spagnola case and indicated parenthetically that the court there determined the CSRA did not deprive the court of jurisdiction to hear claims for equitable relief. Order dated August 17, 1989, at 11 (citing Spagnola v. Mathis, 859 F.2d 223, 229-30 (D.C. Cir. 1988)).

Determining whether the court has jurisdiction over plaintiff's claims for

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[2]Jurisdiction over cases brought under the APA also must be grounded in 29 U.S.C. § 1331, because the APA does not serve as an independent jurisdictional grant. Califano v. Sanders, 430 U.S. 99, 105, 97 S. Ct. 980, 984, 51 L.Ed.2d 192 (1977). The APA does relieve a party properly bringing an action under the APA, however, from establishing a private right of action under any other statute. Glacier Park Foundation v. Watt, 663 F.2d 882, 885 (9th Cir. 1981).

equitable relief directly under the Constitution requires a similar analysis to determining whether such jurisdiction may be found under the APA. Section 1331 grants federal courts the power to fashion judicial remedies for violations of constitutional rights by state or federal officials. Bush v. Lucas, 462 U.S. 367, 374, 103 S. Ct. 2404, 2409, 76 L.Ed.2d 648 (1983). The courts will not exercise that power where Congress has provided an alternative statutory remedy and has indicated by the statutes's intent, language, legislative history or the statutory remedy itself that courts should not provide an additional judicial remedy. Id. at 378, 103 S. Ct. at 2411. Thus, the court must determine whether the pervasiveness of the CSRA remedial scheme indicates a Congressional intent that the courts not exercise their power to provide judicial remedies in

additional to remedies provided in the CSRA.

Defendants now contend that its concession that the court could hear plaintiff's constitutional claims under the APA was based upon an incorrect interpretation of Kotarski. Defendants argue that the CSRA preempts application of the APA, because the pervasive scheme of the CSRA indicates a Congressional intent that the statute provide an exclusive remedy. Defendants also contend that, even if the remedies the CSRA provides are not as extensive as those plaintiff may have under an action brought directly under the Constitution, the comprehensiveness of the CSRA remedial scheme indicates a Congressional intent that the courts not provide an additional judicial remedy. Defendants argue that the nature of the remedy afforded, whether money damages or equitable

relief, should not be determinative of whether the CSRA preempts actions brought under the APA or the Constitution.

Plaintiff argues that the authorities defendants cite pertain only to preclusion by the CSRA of judicially-created remedies and not to the statutorily-created remedies found in the APA.[3] Plaintiff also contends that, even if the CSRA did preempt actions brought under the APA, the statutory scheme of the CSRA covers only federal personnel actions, which do not include actions pertaining to an employee's violation of ethical rules. Finally, plaintiff main-

---

[3]Plaintiff also interprets defendants' argument concerning jurisdiction under the APA to be based upon a contention that plaintiff's claim for back pay is a claim for money damages, rather than an equitable claim. The court does not understand defendants to have raised that issue, however nor does the court need to address it in light of its ruling that both legal and equitable claims may be brought only under the CSRA.

tains that the court's prior order should be followed, because no subsequent cases have revised the Ninth Circuit's Kotarski holding on which the court relied.

The court is persuaded that plaintiff is limited to the relief provided by the CSRA. Plaintiff offers no good reason why the reasoning of recent Supreme Court and circuit court decisions concerning the exclusivity of the remedies provided by the CSRA should not apply to claims for equitable relief as well as to claims for money damages. The court's prior order deciding that the court had jurisdiction under the APA to hear plaintiff's equitable claims relied upon a Ninth Circuit decision, Kotarski v. Cooper, 799 F.2d 1342, 1352 & n.6 (9th Cir. 1986) ("Kotarski I"). In the light of more recent authority, including the Ninth Circuit's revisitation of

Kotarski I, the court must vacate the order of August 17, 1989 on this issue.

In Kotarski I, the court allowed the plaintiff to pursue a Bivens action on the basis that, as a probationary employee, the plaintiff had no adequate remedy under the CSRA for violations of his constitutional rights. The court previously had decided in Veit v. Heckler that a plaintiff whose claim fell within the purview of the CSRA was limited to his remedies under that statute. Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984). In Kotarski I, however, the court limited the holding of Veit to non-constitutional claims. On that basis, this court held that the APA was not preempted by the CSRA as to plaintiff's constitutional claims, although the court also held that the APA only waived sovereign immunity as to claims for equitable relief.

The Supreme Court vacated Kotarski I and remanded the matter to the Ninth Circuit for reconsideration in light of the Court's holding in Schweiker v. Chilicky, 487 U.S. 412, 108 S. Cit. 2460, 101 L.Ed.2d 370 (1988). Cooper v. Kotarski ____ U.S. ____, 108 S. Ct. 2861, 101 L.Ed.2d 897 (1988). In Chilicky, the Court had held that the comprehensive scheme of the Social Security Act precluded a plaintiff from bringing a Bivens action, even though the relief provided by the act was not as complete as that afforded by an action brought directly under the Constitution. Id. at ____, 103 S. Ct. at ____.

On remand of Kotarski I, the Ninth Circuit held that the rationale of Chilicky precluded plaintiff's Bivens action, because the CSRA "provided some mechanism for appealing adverse personnel actions, it cannot be said that the failure to provided

damages, or complete relief, was "'inadvertent.'" Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989) ("Kotarski II"). The court has since reaffirmed that holding in Saul v. United States, No. 89-35693, slip op. at 2567, 2585, 928 F.2d 829, 837 (9th Cir. 1991). The court here held that in drafting the CSRA Congress had not inadvertently omitted a damages remedy for plaintiff because the statute provided him with remedies of either requesting the OSC to investigate the complained-of practice as a prohibited personnel policy or pursuing a grievance under his collective bargaining agreement, Id. at 2587, 928 F.2d at 838-39, the very remedies that were available to plaintiff in this case.

In recounting the applicable rule of Chilicky, the court in Kotarski II Stated, "So long as Congress' failure to provide money damages, or other significant relief,

has not been inadvertent, courts should defer to its judgment...." Kotarski II, 866 F.2d at 312. (emphasis added). The Ninth Circuit has not yet addressed the question of whether the rationale of Chilicky would apply to claims for equitable relief. The preceding language indicates, however, that this circuit would not limit the application of Chilicky only to suits for money damages.

The Supreme Court emphasized in Bush v. Lucas that the question in determining whether the court should hesitate to provide a judicial remedy for constitutional violations in addition to remedies provided by Congress was "not the merits of the particular remedy...sought...[but r]ather...who should decide whether such a remedy should be provided." Bush, 462 U.S. at 380, 103 S. Ct. at 2412, quoted in Kotarski I, 799 F.2d at 1353 (Hall, J.,

dissenting). Recent decisions in other circuits also support this conclusion. In Lombardi v. Small Business Administration, for example, the Tenth Circuit held that the CSRA preempts actions for injunctive relief as well as Bivens actions. Lombardi, 889 F.2d 959, 961-62 (10th Cir. 1989). The court reasoned that Chilicky and related cases "virtually prohibit intrusion by the Courts into the statutory scheme established by Congress...whether it is accomplished by the creation of a damages remedy or injunctive relief." Id. See also Hallock v. Moses, 731 F.2d 752, 757 (11th Cir. 1984) (rejecting employee's claim for injunctive relief based on alleged retaliation for exercise of her first amendment rights and relegating her to remedies provided by CSRA).

Plaintiff relies upon a D.C. Circuit case, one of several decisions from that

circuit holding that the CSRA does not preclude claims for equitable relief for violations of an employee's constitutional rights. Spagnola v. Mathis, 895 F.2d 223, 229-30 (D.C. Cir. 1988). The Spagnola opinion is entirely unsupported by legal analysis, and relies entirely on four prior decisions of that circuit. Id. Two of those four decisions preceded the Supreme Court's ruling in Bush v. Lucas, and were based on the lack of a "clear signal" from Congress that the CSRA was meant to replace pre-existing judicially-created remedies for constitutional violations. Cutts v. Fowler, 692 F.2d 138, 140-41 (D.C. Cir. 1982); Borrell v. United States International Communications Agency, 682 F.2d 981, 989-90 (D.C. Cir. 1982). Of the more recent decisions, one distinguished Bush on the basis that the CSRA there provided at least a "meaningful" remedy, which it did

not in that case, as well as relying upon one of the pre-Bush decisions. Williams v. I.R.S., 745 F.2d 702, 704 (D.C. Cir. 1984). The other merely states summarily that Bush applies only to damage claims against individuals. Hubbard v. U.S. E.P.A. Administration, 809 F.2d 1, 11 (D.C. Cir. 1986). The court does not find the reasoning the decisions persuasive and declines to follow them.

The court also does not accept plaintiff's argument that this case can be distinguished from most other cases addressing this issue on the basis that plaintiff here seeks relief under the APA, rather than directly under the Constitution. The court does not disagree with plaintiff that the APA may apply to "'government employment.'" Plaintiff's Response, at 22. The APA itself, however, provides that it does not apply "to the

extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. 701(a). In addition, in waiving sovereign immunity as to suits against government agencies, the statute provides that nothing in that provision "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." Congress has indicated by the comprehensiveness of the CSRA that that statute should preclude judicial review under the APA. As the Fifth Circuit explained, the rationale that prevents recovery directly under the Constitution applies as well to actions brought under the APA:

> The CSRA creates an extensive scheme regulating civil service personnel decisions. Some agency actions are reviewable by circuit courts, some by district courts,

> and some by no court at all. We decline to allow an employee to circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA. The reasoning of Bush in denying a constitutional right of action is applicable here, for allowing suit under the APA would likewise "encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government o the opportunity to work out its personnel problems within the framework it has so painstakingly established."

Broadway v. Block, 694 F.2d 979, 986 (5th Cir. 1982) (citing Bush v. Lucas, 647 F.2d 573, 577 (5th Cir. 1981). See also Pinar v. Dole, 747 F.2d 899, 912-13 (4th Cir. 1984).

The Eleventh Circuit also rejected a plaintiff's argument that the APA provides an additional remedy to those provided under the CSRA. Stephens v. Dept. of Health and Human Services, 901 F.2d 1571, 1575 (11th Cir. 1990). The court there

relied on the Supreme Court's holding in United states v. Fausto in concluding that "the CSRA [is] now the exclusive remedy of the federal employee." Id. (citing United States v. Fausto, 484 U.S. 439, 108 S. Ct. 668, 98 L.Ed.2d 830 (1988)). The court also notes that section 701(a)(1) of the APA excepts review where the statute precludes it, and the comprehensive scheme of CSRA indicates a clear intent to provide an exclusive remedy. Id. at 1576.

Plaintiff also argues that his claims are not cognizable within the CSRA and he therefore must be allowed to bring them in this court. Plaintiff contends that the CSRA precludes only actions brought outside its provisions that pertain to "[m]inor personnel actions' or matters pertaining to employment regulations and procedures and not to "matters external to federal laws and regulations or constitutional in na-

ture." Plaintiff's argument clearly is wrong as it pertains to constitutional claims.

> Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system...[T]he Government's comprehensive scheme...provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies.

Bush v. Lucas, 462 U.S. at 386, 103 S. Ct. at 2415; Saul v. United States, No. 89-35698, slip op. at 2577, 928 F.2d at 834.

Further, although plaintiff's superiors seemed almost cavalier in their reaction to plaintiff's clearly legitimate ethical concern, the court disagrees with plaintiff that the CSRA d'd not provide a mechanism for appeal of the agency action at issue in this case. As plaintiff acknowledges, the statute provides a Merit System principle that employees be protect-

ed from reprisals for "lawful disclosure of information which the employees reasonably believe evidences...a violation of any law, rule, or regulations...." 5 U.S.C. 2301(b)(9). Plaintiff's inability to locate any reported cases construing this provision to apply to judicial rules or professional ethics does not serve as authority for the proposition that it does not. On the contrary, if asked to decide this question as a matter of first impression, this court would interpret that provision as intended to protect employees from reprisals for such disclosures. Moreover, in listing the prohibited personnel practices identified by the statue, plaintiff mischaracterizes the practice identified in section 2302(b)(8)(A) as "whistle-blowing while undertaking a personnel action." That section actually

provides that any covered employee in a position of authority

> shall not, with respect to such authority-- (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee...because of--
>
> > (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--
> >
> > > (i) a violation of any law, rule, or regulation....

5 U.S.C. 2301(b)(8)(A). Again, the court interprets that provision as cognizant of plaintiff's claims in this case.

Because the CSRA has provided a mechanism for appeal of the agency action at issue in this case, and because the comprehensive scheme of the CSRA precludes the court from exercising jurisdiction over plaintiff's claims under either the APA or the Constitution, the court will grant

defendants' motion to dismiss this matter. Plaintiff's motion for partial summary judgment, defendants' cross-motion and the motion to strike defendants' augmented statement of facts thus will be denied as moot.

IT IS ORDERED granting defendants' motion to dismiss (Doc. No. 97) and denying as moot defendants' cross-motion for summary judgment.

IT IS FURTHER ORDERED denying as moot plaintiff's motion for partial summary judgment (Doc. No. 78).

IT IS FURTHER ORDERED denying as moot plaintiff's motion to strike augmented statement for facts (Doc. No. 104).

DATED this _____ day of July, 1991.

Robert C. Broomfield
United States District Court

Copies to all parties of record

APPENDIX C

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle)
ANDERSEN, RONALD M. MR.

2. SSN
288-38-6389

4. Date of Birth
11-26-43

5. Veteran of Preference: 1-None 2-5 Pt. 3-10 Pt. Disab. etc....
1

6. Serv. Comp. Date (Leave)
07-29-79

7. Tenure
1

8. Retirement: 1-CS 2-FICA 3-FS etc....
1

9. FEGLI
B

10. FLSA: E-Exempt N-Nonexempt

11. Sex
M

12. Citizenship: 1-US 2-Other
1

14. Effective Date
07-29-82

15. Annuitant indicator: 1-Reempt Ann-CS 2-RETO 3-RETM . . . 9-Not Applicable
9

16. Work Schedule: F-Full-time etc....
F

18.A NOAC
880

18.B Nature of Action
Chg in Tenure Group

18.C Auth Code
PKM

18.D Authority
Reg 351.502

27. To: Position Title and Number
Trial Attorney (General) F-0136

28. Name and Location of Employing Office
Equal Employment Opportunity Commission
Office of the Executive Director
Office of Field Services
Phoenix District Office

29. Pay Plan & Occupational Code
GS-00905

30. Grade or Level
13

31. Step or Rate
04

32. Salary
$36,946

33. Pay Basis
pa

34. Duty Station
Phoenix, Maricopa, Arizona

35. Position Occupied: 1-Competitive 2-Excepted etc....
2

36. Appropriation Code (Optional)
9669851900000111

37. Remarks
Service counting toward career tenure from: 07-29-79 to 07-29-82

A. Title of Approving Official
District Director

C. PRD
0

E. Functional Class
00

C. Signature/Authentication of Approving Official
Hermilo R. Gloria

I. Agency Code
EE 00

J. Location Code
040 37 0013

K. SON
3201

Employing Department or Agency
Equal Employment Oportunity Commission

APPENDIX D

JENNINGS, STROUSS & SALMON
ATTORNEYS AT LAW
ONE RENAISSANCE SQUARE
TWO NORTH CENTRAL
PHOENIX, ARIZONA 85004-2393

TELEPHONE (602) 262-5911
TELECOPY (602) 253-3255

WRITER'S DIRECT LINE
262-5843

February 9, 1988

Ronald M. Andersen
4202 North 63rd Avenue
Phoenix, Arizona 85033

Re: EEOC v. Suite Simpatica Ltd.

Dear Mr. Andersen:

This letter will confirm that you contacted me by telephone one February 8, 1988 and asked me to advise you regarding your ethical obligations arising out of your recent involvement in a civil lawsuit pending in the United States District Court for the District of New Mexico styled: EEOC v. Suite Simpatica Ltd.

I have reviewed your letter to me of February 8, 1988 together with the chronology of events and the seven exhibits attached thereto. Following review of those materials I discussed them with my partner, Rita Meiser. Ms. Meiser is generally knowledgeable about EEOC matters and has been involved in questions of professional conduct for many years.

In your letter of February 8, 1988, you ask for my opinion regarding six specific questions. I have not had sufficient time to analyze or research four of those sex questions, but I will try to give you my tentative impressions regarding your first two questions. These deal with whether or not you are ethically obligated to withdraw as counsel for the EEOC in EEOC v. Suite Simpatica Ltd. and, if so, when that withdrawal must be made.

While I am prepared to give you tentative impressions at this time, I must caution you that I have not reviewed this matter in depth, nor have I had sufficient time to carefully research the issues. Accordingly, the statements in this letter should be reviewed by you as preliminary advice rather than reasoned opinions on my part.

I am assuming that all of the information contained in your letter and its enclosures to be accurate and that both New Mexico and Arizona have adopted the ABA's "Model Rules of Professional Conduct."

Most importantly, I am assuming that you believe and have good reason to believe that one of the charging parties in the lawsuit (Ms. Mangum) has in fact offered a $2,000 bribe to a witness (Mr. Manley) in the case and has attempted to solicit from that witness perjured testimony to be given

at the forthcoming trial on February 24, 1988.

Based on the foregoing assumption, it is my tentative impression that the ethical prescriptions contained in the Rules of Professional Conduct require your withdrawal as counsel in the case.

You have informed me that neither the EEOC nor its trial counsel have an attorney-client relationship with the charging parties. In this particular case all five of the charging parties are represented by private counsel (Mr. Vance) in New Mexico. As I understand it, the EEOC and its trial lawyers represent only the United States government and your role is limited to "vindicating" Title VII of the Civil Rights Act of 1964 (as amended) 42 USC 2000(e). For this reason I have not reviewed those sections of the Rules of Professional

Conduct which deal with acts of a similar nature by "clients."

In this analysis I am assuming that Ms. Mangum is a witness in the case and that your role as counsel would include a joint effort with private counsel (Mr. Vance) in establishing Ms. Mangum's claims under Title VII.

Ethical Rule 3.3 prohibits lawyers from knowingly making false statements of material fact to the court. That Rule also prohibits you from failing to disclose material facts to the court when disclosure is necessary to avoid assisting a criminal or fraudulent act "by the client." The Rule also prohibits you from offering evidence that you know to be false and requires you to take reasonable remedial measures if false evidence has been offered. Ethical Rule 3.4 prohibits lawyers from counseling or assisting witnesses to

testify falsely or to offer an inducement to a witness that is prohibited by law.

Ethical Rule 1.16 requires a lawyer to withdraw from the representation of a client if the representation will result in violation of the rules of Professional Conduct or any other law. This Rule permits withdrawal for a variety of reason including those situations where the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent.

I cannot and do not opine on whether or not Ms. Mangum's alleged conduct in attempting to bribe a witness did in fact take place. What is important to me is that you believe those allegations. Given that belief, I do not think that you can meet your ethical responsibilities to the court if your remain in the case.

The related question of "when" withdrawal as counsel should take place is, in part, covered by Ethical Rule 1.16. That Rule states that a lawyer shall continue representation notwithstanding good cause for terminating the representation "when order to do so by a tribunal." The Rule also provides that when you do terminate the representation, you must take steps to the extent reasonably practical to protect a client's interests. you have to give reasonable notice to the client, allow time for employment of other counsel, and surrender the papers and property to which the client is entitled.

Whether or not a lawyer for an organization such as the EEOC may have a legal obligation to that organization after withdrawing is beyond the scope of the Rules of Professional Conduct. Likewise, I

cannot opine or give you any impression on this issue.

Please let me know if I can be of any further assistance to you.

Very truly yours,

JENNINGS, STROUSS & SALMON

/s/

By
Gary L. Stuart

GLS/dc

APPENDIX E

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

March 11, 1988

MEMORANDUM

To: Charles A. Shanor
General Counsel

From: Richard D. Komer
Legal Counsel

Subject: Ethical Duties of Attorneys Who Learn of Charging Party Misconduct

You have asked us to address in a general manner the ethical duties of attorneys who learn in the course of preparing for litigation that a charging party may have engaged in criminal or fraudulent behavior or attempted criminal or fraudulent behavior. As a basis for our analysis, we note that charging parties, while not actual clients of Commission attorneys in Commission litigation, are treated like clients with respect to confidences, privileges and

other ethical obligations. We address below the questions of when a Commission attorney is required to withdraw from a case and when he or she is required to inform a tribunal from a case and when he or she is required to inform a tribunal of fraudulent or criminal or attempted fraudulent or criminal conduct. We also address the various responsibilities of supervisory attorneys and subordinate attorneys under the ethical supervisory attorneys and subordinate attorneys under the ethical standards.

The ABA Model Rules of Professional Conduct contain two provisions governing withdrawing from representation of a client, one mandatory, and one permissive:

> Rule 1.16 Declining or Terminating Representation
>
> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has

> commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;....
>
> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;....
>
> (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

In sum, lawyers are required to withdraw from representing a client only if the representation <u>will result</u> in a violation of the Rules or of law. Lawyers <u>may</u> withdraw if the client engages in conduct the lawyer <u>reasonably believes</u> is criminal or fraudulent. A Commission attorney's reasonable belief that a charging party may

have engaged in criminal or fraudulent conduct might allow permissive withdrawal from a case but would not require mandatory withdrawal from the case.

The Model Rule governing candor toward a tribunal states:

> Rule 3.3 Candor Toward the Tribunal
>
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> ...
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

This rule requires that lawyers disclose material facts to a tribunal when the disclosure is necessary to prevent a client from committing a fraudulent or criminal

act. The rule apparently does not require disclosure of mere allegations of an attempted criminal or fraudulent act, when the attempt was not successful.[1] The rule also forbids a lawyer from offering evidence known to be false. Again, it does

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[1]This rule maybe open to different interpretation. The Committee of Rules of Professional Conduct, State Bar of Arizona issued an opinion in 1980 that addressed a plaintiff's lawyer's learning of the defendant's offer of a bribe to a witness. While the Committee doubted that the mere offer of a bribe constituted a fraud on the court, it stated that, "The spirit of the Disciplinary Rule is nevertheless apparent and relevant--that lawyers have a duty to protect the integrity of the courts and other adjudicatory bodies against fraudulent practices perpetrated in the course of proceedings before them by reporting information they may receive pertaining to any such frauds on the part of non-clients to those tribunals. The opinion was written under the Model Code of Professional Conduct, which provided that under the Model Code of Professional Conduct, which provided that "A lawyer who receives information clearly establishing that...[a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." DR 7-102(B)(2).

not appear to apply to situations where allegations of wrongdoing arise, without proof that false evidence or testimony will be given.

Two of the model rules address the responsibilities of supervisory lawyers and of subordinate lawyers:

> Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer
>
> * * *
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders, or with knowledge of the specific conduct ratifies the conduct involved; or
>
> (2) the lawyer...has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

> Rule 5.2 Responsibilities of a Subordinate Lawyer
>
> (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
>
> (b) A subordinate lawyer does not violate the rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional responsibility.

The first rule governing supervisory lawyers addresses a supervisor's responsibility when a subordinate lawyer violates the Rules of Professional Conduct with the knowledge of the supervisor, and perhaps at the supervisor's order. For instance, a Commission supervisory attorney would be responsible for a staff attorney's violation of the Rules if the supervisor orders the staff attorney to take testimony from a charging party at trial when the staff attorney <u>knows</u> the charging party intends to commit perjury or if the supervisor

knows the staff attorney plans to put that charging party on the stand.

The second rule indemnifies a subordinate attorney from a violation of the Rules if the subordinate follows a supervisor's reasonable resolution of an arguable ethical question. The ABA's comments on the rule indicate that when lawyers in a supervisor-subordinate relationship encounter an ethical question, the supervisor may assume responsibility for making the judgment.

When a question is reasonably arguable, the supervisor's investigation, if necessary, consideration and reasonable resolution of the ethical question may guide a subordinate attorney with no ethical consequences should the supervisor's resolution be subsequently challenged.

Another ethical concern that might arise if a Commission attorney learns of criminal or fraudulent or attempted crimi-

nal or fraudulent behavior by a charging party is whether the attorney might be called as a witness in the Commission's case or in a subsequent criminal proceeding. The Model Rules provide as follows:

> Rule 3.7 Lawyer As Witness
>
> (a) A lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness....

A witness is required to testify on the basis of personal knowledge. Therefore, a lawyer could only be likely to be a necessary witness if he or she has personal knowledge of a matter that is in issue in a trial. A Commission attorney's learning of allegations of wrongdoing on the part of a charging party does not constitute personal knowledge, nor does the information necessarily make the lawyer likely to be a necessary witness. Any ethical concerns a lawyer might have about being called as a witness in a subsequent criminal trial are

groundless because the rule applies only to a lawyer's being called as a witness in the same trial in which he or she is an advocate.

OLC:KORAM:3/9/88
SMR: Ethics

OPINION NO. 80 - 28
December 12, 1980

FACTS:

"An attorney representing the plaintiff in a civil action for the collection of a debt reduced to judgment learns that the defendant has offered to bribe a witness to testify to certain facts which might permit the judgment to be attached. The witness contacts the attorney and expresses his willingness to cooperate with the appropriate law enforcement agency."

The inquiring attorney has further advised, upon our request for a clarification of the facts, that:

1. The action is one to reduce to judgment against the defendant in Arizona a judgment secured against him in another state;

2. The defendant's conduct to date has been limited to the offer to the witness, no actual bribery having as yet occurred;

3. The facts to which the defendant desires the witness to testify are untrue, such that the witness would commit perjury were such testimony to be given under oath; and

4. As yet, the witness has no consented to testify to the untrue facts and has not testified in any manner in the litigation.

QUESTIONS:

1. Does the attorney have an ethical obligation to report the information he has received concerning the defendant's offer

to bribe the witness to the appropriate law enforcement agency?

2. Does the attorney, instead, have an ethical obligation to withhold this information from the appropriate authority because of the potential benefit his client may derive in the civil action if the defendant attempts to challenge the validity of the foreign judgment?

CODE PROVISIONS INVOLVED:

EC 7-26. The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. ***

EC 7-27. Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. ***

DR 7-102. Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

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(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

*****

(B) A lawyer who receives information clearly establishing that:

*****

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-105. Threatening Criminal Prosecution

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil action.

DR 7-109. Contact with Witnesses.

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

*****

EC 8-5. Fraudulent, deceptive or otherwise illegal conduct by a participant in a proceeding before a tribunal...is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

OPINION:

As to Question 1:

As worded, this question inquires whether there is an ethical duty imposed on the lawyer, without delay, to report the defendant's offer to bribe the witness to the proper authorities. The Code provisions which appear to be most nearly in point are DR 7-102(B)(2) and EC 8-5. The former requires a lawyer "promptly" to

reveal to a tribunal fraud which a person other than his client "has perpetrated" upon it, after the lawyer's receipt of information clearly establishing the perpetration of such fraud. While we have no doubt that the defendant's completed bribery of the witness resulting in the witness's committing perjury in giving testimony would constitute the perpetration of a fraud upon the court, the facts presented to us indicate merely that the defendant "has offered to bribe" the witness. Since there has been no actual bribery of the witness, and since the witness has not yet committed perjury in any sworn testimony, we doubt whether there has as yet been the perpetration of a fraud upon the court and accordingly question whether the precise language of DR 7-102(B)(2) (which is worded in the past tense) has been satisfied. The spirit of

the Disciplinary Rule is nevertheless apparent and relevant -- that lawyers have a duty to protect the integrity of the courts and other adjudicatory bodies against fraudulent practices perpetrated in the course of proceedings before them by reporting information they may receive pertaining to any such frauds on the party of non-clients to those tribunals.

The applicability of EC 8-5 to the facts submitted appears less doubtful. The defendant's offer to bribe a witness, without more, can be characterized as fraudulent and, perhaps, illegal conduct by a participant in a proceedings before a court. (As to possible illegality, see A.R.S. §§ 13-2902(A)(1) and 13-2804(A)(2).) There being no client confidences problem here, the Ethical Consideration (which is, of course, merely aspirational in character rather than mandatory) states that the

lawyer "should reveal to appropriate authorities" such knowledge as he has of the reported improper conduct of the defendant.

Additional Code provisions having possible (although rather uncertain) relevance to the first question are EC 7-27, DR 7-102(A)(3) and DR 7-109(A) to the effect that a lawyer should not conceal, suppress or knowingly fail to disclose "evidence" which he or his client has a "legal obligation" (or is "required by law") to reveal or produce. It is not clear here that the information which the inquiring attorney has received concerning the attempted bribery of the witness constitutes "evidence", within the meaning of the cited Code provisions. And, in any event, since this Committee does not rule on questions of law, we express no opinion on the question as to whether the inquiring attorney is "legally" obligated to disclose this

information to the court or other authorities.

We do not regard DR 7-105(A) as conflicting with the inquiring attorney's apparent duty of disclosure under the Code provisions discussed above so long, at least, as he does not use the threat of criminal proceedings based upon the attempted bribery as a sword in extra-judicial dealing with the defendant looking toward some advantage to the plaintiff in the collection of the judgment debt.

Based on our interpretation of the Code provisions appearing to bear on the issue, we answer the first question in the affirmative.

As to Question 2:

This question raises the issue as to whether the lawyer owes a countervailing and controlling obligation to his client to withhold disclosure of the incriminating

information he has received from the witness because of the potential benefit his client may derive from its use in the further prosecution of the actions should the defendant attempt to challenge the validity of the foreign judgment. (The ethical duty which we found to exist by our affirmative answer to the first question is one owed to the courts and the legal system generally, rather than to the client.)

Having answered Question 1 in the affirmative, we have necessarily ruled that, on the facts presented here, the attorney's duty to the courts and the legal system generally controls over his duty to his client, hence we must answer Question 2 in the negative.

Although neither holding is very closely in point, we have ruled in two of our earlier opinions that a lawyer might not ethically defer until a later stage of

legal proceedings use of information known to him for the felt purpose of advancing the interests of his client more strategically:

1. In Opinion No. 220 (March 15, 1967), an attorney representing a criminal defendant in federal district court had waived the filing of indictment and consented to the filing of an information, as requested by the prosecutor, in the belief that the case was non-capital. He later determined that the offense was a capital one and that it was jurisdictional that the prosecution be initiated by indictment rather than information, indicating to us that he doubted that the prosecutor was aware of the jurisdictional defect. The inquiring attorney suggested:

> "I would like to <u>not</u> make any pre-trial motions, sit back, and allow the Government to try its case. Should the defendant be convicted, I will thereafter

> raise the questions and secure a reversal (or new trial). Of course, this thought is entirely on behalf of my client."

In response to questions submitted which, as here, raised the issue of whether the attorney's greater obligation or duty was owed to the court or to the accused client, we held that former Canon 22, "Candor and Fairness", covered the problem and ruled that:

> "To pursue the proposed course would amount to a deception, would impose the additional burden on the Court of again trying the case, would be a needless waste of time, and would be calculated to mislead the Court into error. Such course is not part of the duty and obligation one owes a client. That obligation does not require nor countenance deception. *** It is the opinion of the Committee that the jurisdictional defect, of necessity, should be properly presented to the Court."

2. In Opinion No. 74-15 (June 4, 1974), the question submitted was:

> "Must an attorney representing a defendant in a criminal case raise a matter of jurisdiction at the omnibus hearing, or can he wait until his client is placed in jeopardy and then move to dismiss the action for lack of jurisdiction?"

After citing Rule 16.1 of the Rules of Criminal Procedure and quoting from the Omnibus Hearing Form, we wrote that:

> "In a situation where the attorney knows at or before the time of the omnibus hearing that there is a question regarding the jurisdiction of the court, he is under an ethical duty to raise that issue at the time of the omnibus hearing. To conceal this information at the time of the omnibus hearing would be both a failure to disclose that which the attorney is required by law to reveal and, through his certification on the omnibus hearing form, the attorney would be making a false statement of fact. To withhold this information is clearly a violation of DR 7-102(A)(3) and (5), ..."

Although both of these opinions are rather obviously distinguishable from the present case - the element of duty to the

court being considerable stronger in a case of a jurisdictional defect than in the situation presented here - they have some significance as indicating that a lawyer's duty to the courts and the legal system generally is at times superior to that owing to his client to secure a successful outcome in his case.

APPENDIX F

REQUEST FOR PERSONNEL ACTION

Part I - Requesting office

B - For Additional Information Call etc....
Betty Combs, 261-4380

H - Approved by etc....
Hermilo R. Gloria, District Director

Part II

1. Name (Last, First, Middle
ANDERSEN, RONALD M.

2. SSN
288-38-6389

3. Position Sensitivity (Occ)
NS

4. Date of Birth
11-26-43

5. Veteran Preference
1

6. Serv Comp Date (Leave)
07-29-79

7. Tenure
1

8. Retirement
1

9. FEGLI
B

10. FLSA
E

11. Sex
M

12. Citizenship
1

14. Effective Date
02-10-88

15. Annuitant indicator
9

16. Work Schedule
F

18-A. NOAC
317

18-B. Nature of Action
Resignation

18-C. Auth Code
Reg 715.202

20. FROM: Position Title and Number
Trial Attorney (Civil Rights) F-0566

21. Name and Location of Employing Office
EEOC, OFF OF CHAIRMAN, OFF OF PROG OPR
FLD MGMT PROG (WEST) PHOENIX DIST
OFFICE OF THE DIRECTOR
LEGAL DIVISION

22. Pay Plan & Occupational Code
GS-00905

23. Grade or Level
13

24. Step or Rate
06

25. Salary
$46,086

26. Pay Basis
pa

34. Duty Station
Phoenix, Maricopa, Arizona

35. Position Occupied: 1-Competitive 2-Excepted 3-SES General etc....
2

36. Appropriation Code (Optional)
9669851900000111

37. Remarks
R19 - Reason for resignation: See Block IV Part a
M67 - Forwarding address: P.O. Box 2238, Phoenix, AZ 85002
N27 - Lump-sum payment to be made for any unused annual leave.
B47 - Health benefits coverage is extended for 31 days during which you are eligible to convert to an individual policy (nongroup contract).
SF-8 issued to employee.
SF-2815 completed and provided to employee.

38. Approval
(signature - T. Florez) 2-11-88

39. FPMIS Data

A. Supv or etc....
8

B. VEV Ind
N

C. PRD
0

D. Barg Unit Status
0020

E. Functional Class
00

F. Educational Level
15

G. Year Degree Attained
71

H. Academic
1401

I. Agency Code
EEOC

J. Location Code
040370013

K. SON
3201

N. WC

O. 9878

Part III - Clearances

A. Initials/Signature Date
(Initials - TF) 2/11/88

Part IV - Employee Resignation/Retirement

A. Reason for Resignation/Retirement
I was constructively and wrongfully discharged by my superiors Richard L. Green, Supervisory Trial Attorney and Richard R. Trujillo, Regional Attorney, who ordered me to do that which the Rules of Professional Conduct prohibit. The full circumstances of these facts will be conveyed by separate cover to the office of General Counsel of the EEOC and to the Chairman of the EEOC.

B. Effective Date of Resignation
2/9/88

C. Employee's Signature
(signature Ronald M. Andersen)

D. Date Signed
2/11/88

E. Forwarding Address etc....
4202 N. 163 rd Avenue
Phoenix, Arizona 85033

APPENDIX G

5 U.S.C. §701

(a) This chapter [5 U.S.C. §§701 et seq.] applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter [5 U.S.C. §§701 et seq.] --

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include --

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of

title 41 [41 U.S.C. §§101 et seq.]; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix, and

(2) "person," "rule," "order," "license," "sanction," "relief," and "agency action" have the meanings given them by section 551 of this title.

APPENDIX H

5 U.S.C. §702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

APPENDIX I

5 U.S.C. §704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

APPENDIX J

5 U.S.C. §705

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the

review court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX K

5 U.S.C. §1206

(a)(1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(2) If the Special Counsel terminates any investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation and the reasons therefor.

APPENDIX L

5 U.S.C. §2301

(a) This section shall apply to --
(1) an Executive agency;

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(8) Employees should be --
(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences --

(A) a violation of any law, rule, or regulation, or

APPENDIX M

5 U.S.C. §2302

(a) (1) For the purpose of this title [5 U.S.C. §§1 et seq.], "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section --

(A) "personnel action" means --

(iii) an action under chapter 75 of this title [5 U.S.C. §§7501 et seq.] or other disciplinary or corrective action;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include--

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title [5 U.S.C. §2301].

APPENDIX N

5 U.S.C. § 7511

(a) For the purpose of this subchapter [5 USC §§ 7511 et seq.]--

(1) "employee" means--

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

APPENDIX O

5 U.S.C § 7512

This subchapter [5 USC §§ 7511 et seq.] applies to--

(a) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;